Supreme Court, U.S.
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No. 98-1881

IN THE

Supreme Court of the United States

October Term, 1998

In re:
GEORGE C.S. LIU and GAIL K. LIU,

Debtors,

GEORGE C.S. LIU and GAIL K. LIU,

Petitioners,

-against-

KENNETH P. SILVERMAN, ESQ.,
Chapter 7 Trustee of the Estate of
George C.S. Liu and Gail K. Liu,

Respondent.

On Petition For Writ of Ceriorari To The United States Court of Appeals For The Second Circuit

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether the Second Circuit Court of Appeals erred in affirming the determination of the United States District Court for the Southern District of New York that the United States Bankruptcy Court for the Southern District of New York had not abused its discretion by granting Respondent's motion as Chapter 7 Trustee, pursuant to 11 U.S.C. §9019, and approving Respondent's $1.2 million settlement of the Appellants-Debtors' state court for legal malpractice and fraud.

Preliminary Statement

Respondent, Kenneth P. Silverman, Esq., the Chapter 7 Trustee (the "Trustee") of the bankruptcy estate of petitioners George C.S. Liu and Gail K. Liu (the "Debtors"), by his attorneys, Jaspan Schlesinger Silverman & Hoffman, LLP, respectfully submits this brief in Opposition to the Debtors' petition for a writ of certiorari on the grounds that the determinations for which the Debtors now seek review do not concern the resolution of conflicting decisions involving an important federal matter or a departure form the accepted and usual course of judicial proceedings, as specified in Supreme Court Rule 10, but rather involve the sound exercise of judicial discretion arising out of the approval of a $1.2 million settlement of the Debtors' legal malpractice action by the United States Bankruptcy Court for the Southern District of New York.

Statement of Facts

On March 3, 1994 (the "Filing Date"), the Debtors filed a voluntary petition for relief in accordance with chapter 11 of Title 11 of the United States Code which was subsequently converted to a chapter 7 liquidation proceeding. By Notice of Appointment dated June 20, 1996, Kenneth P. Silverman, Esq. was appointed and duly qualified as the chapter 7 Trustee of the Debtors' estate.

In March 1992, prior to the filing of their voluntary bankruptcy petition, the Debtors commenced an action in the Supreme Court of New York, County of New York entitled "*George C.S. Liu and Gail Kim Liu v. Joseph T. Macari, Louis*

J. Macari, Frank G. Messina, Neil Weissman, Macari, Messina & Ingber, a partnership, and Gould and Weissman, a partnership" (the "State Court Action"). At that time, the Debtors were represented by Elliot Rudick, Esq.

During their chapter 11 proceeding, the Debtors continued with the proceeding, the Debtors continued with the prosecution of State Court Action through Mr. Rudick. Thereafter, upon his appointment, the Trustee continued with the prosecution of the State Court Action, which had part of the Debtors' bankruptcy estate, again through Mr. Rudick, for the benefit of the Debtors' bankruptcy estate and their creditors.

The State Court Action arose out of the Debtors's purchase of certain real property consisting of a ninety-one unit co-operative apartment building located in Queens, New York, known as Blair House, from defendant Joseph T. Macari. The facts alleged by the Debtors are as follows:

In or about April 1986, the Debtors located certain real property in Elmhurst, New York that they were interested in purchasing for investment purposes. When they communicated that interest to their attorney, defendant Louis Macari, Esq., he and his partner, defendant Frank Messina, Esq., declined to represent the Debtors and referred them to Neil Weissman, Esq. who, upon meeting the Debtors, advised them that he had learned that the Elmhurst property had been sold. Neil Weissman recommended that the Debtors look at Blair House. At that time, the Debtors believed that Blair House had already been converted to co-operative ownership.

On or about June 5, 1986, the Debtors contacted with Joseph T. Macari for the purchase of Blair House for $4.75 million. At that time, the Debtors did not undertake any financial analysis of the propriety of the Blair House transaction, did not retain any engineer to inspect the building and did not know that a tenants group had been formed to

oppose the co-operative conversion. In July 1986, the Debtors became aware that Blair House had *not* been previously converted to co-operative ownership.

The Blair House transaction closed in November 1986. At the closing, the Debtors were represented by Neil Weissman. Joseph T. Macari was represented by Louis J. Macari. Contemporaneously with the closing on Blair House, the Debtors retained Louis J. Macari and Frank Messian to represent them in connection with its conversion to a co-operative apartment building. The total mortgages on Blair House, as a result of the Debtors' purchase thereof, consisted of (a) a $1.5 million loan from State Savings Bank, (b) a $300,000 loan on the Debtors' apartment and (c) $2.15 million in purchase money mortgages owed to Joseph T. Macari.

The Debtors operated Blair House for several years but were unable to do so profitably, and ultimately mortgaged their other unencumbered property in order to pay the debt service and the other expenses associated with Blair House. Eventually, Joseph T. Macari foreclosed on his mortgages and purchased Blair House at the foreclosure sale.

The complaint in the State Court Action asserted causes of action against Joseph T. Macari based upon fraud and misrepresentation in connection with the sale to the Debtors. The Debtors also asserted causes of action against their attorneys, Louis J. Macari, Frank Messina and Neil Weissman, based upon misrepresentation, negligence, malpractice and breach of fiduciary duty in connection with their representation of the Debtors in various aspects of the Blair House transaction. The Debtors sought damages in excess of $6 million.[1]

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1. Inexplicably, the Debtors now claim to have suffered damages in excess of $31 million.

The Settlement of the State Court Action

During the pendency of the State Court Action on the trial calendar, the Trustee and defendants engaged in mediation which resulted in the settlement of the State Court Action. The terms of that settlement required Risk Enterprise Management Limited, as the representative of the insurers of the defendant attorney, to pay to the Trustee the sum of $1,175,000 and for defendant Joseph T. Macari to pay to the Trustee the sum of $25,000 and to waive his $1.8 million claim against the Debtors' estate. The $1.2 million paid to the Debtors' estate under the written stipulation of settlement (the "Stipulation") represents approximately seventy-five (75%) percent of the total available coverage under the malpractice insurance maintained by the defendant attorneys and a significant portion of the only asset that would be available to satisfy a judgment rendered against the defendants in the State Court Action in the unlikely event that the Debtors prevailed at trail and upon any subsequent appeal.[2]

The Trustee's Motion For Bankruptcy Court Approval Of The Stipulation

Thereafter, the Trustee moved for approval of the Stipulation by the Bankruptcy Court pursuant to 11 U.S.C.

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2. During the mediation, the Trustee learned that, although defendants Louis Macari and Neil Weissman originally maintained malpractice insurance in an aggregate sum of $2 Million, a previous claim against Neil Weissman reduced his coverage to $675,000 thereby reducing the total insurance available to pay the Debtors' claims to $1,675,000.

§9019 (the "Motion")[3]. The Debtors filed objections to the approval of the Motion.

The first hearing in connection with the Trustee's Motion was conducted by Chief Bankruptcy Judge Brozman on July 31, 1997. At that time, Chief Bankruptcy Judge Brozman entertained extensive oral argument by the Trustee, his counsel, the Debtors' two bankruptcy counsel and by the Debtors. As a result of the oral argument, the Bankruptcy Court requested that the Trustee provide certain additional information regarding his settlement of the State Court Action and continued the hearing on the Motion to August 19, 1997.

By letter dated August 18, 1997, the Trustee provided the requested information to the Bankruptcy Court. Thereafter, at the August 19, 1997 hearing, the Court, after a review of the Trustee's additional documentation and a lengthy discussion with Mr. Rudick, approved the Stipulation. Chief Bankruptcy Judge Brozman found:

> THE COURT: All right. I think the record will reflect after two hearings that I have given this very careful consideration, and that I have fulfilled my responsibility of canvassing the issues to determine whether the settlement is properly approved.
>
> After having engaged in that exercise, I can only conclude that this settlement is a proper and appropriate one for a number of reasons.
>
> I am particularly persuaded by some of the

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3. 11 U.S.C. §9019 provides as follows: "On motion by the Trustee and after notice and a hearing, the Court may approve a compromise or settlement."

comments made by Mr. Rudick, who is quite naturally sympathetic to the Lius, having represented them prior to his representation of the Trustee, and he has candidly admitted to me a number of things which go to influence my decision.

Number one is he has admitted to me that the case against Mr. Macari is, as the Trustee characterizes it, a thin one, and that there is a much stronger case against Lewis [sic] Macari's law firm than there is against Joseph Marari.

The Trustee has just explained quite ably why it makes sense to settle with Joseph Macari and not sever, and that is, to reduce the claims significantly that are asserted against the fund which would come into the estate.

To sever and proceed against Joseph Macari would really be rolling the dice twice, because the result could be that the claims against the estate stand, and in addition, there is no recovery as against Joseph Macari, and so there is kind of what I call a double whammy against the creditors of the estate, which I don't think would be appropriate, in light of special counsel's view of the strength of the case against Mr. Macari.

There is also a *bona fide* issue with respect to the statute of limitations.

Although counsel are agreed, and I had indicated my preliminary agreement as well as at the time of the previous hearing, that the amendment to the statute of limitations is prospective only and not retroactive, there nonetheless is an iffiness to whether or not there could be a recovery as against Neil Weissman and Lewis [sic] Macari.

And the reason for that is because if it were to be shown that Neil Weissman and Macari are negligent, there is still a question whether or not negligence legally would be sufficient to translate into a breach of contract claim, such that the benefit of the six year statute of limitations could be obtained.

There is, Mr. Rudick candidly admitted to me, there is no case on point, and that those cases which have dealt with the issue in any way have been factually distinguishable.

- So I think although it may be that Mr. Rudick has the better of the arguments on this, there is far from any certainty, and there is– it injects a further element of risk into these proceedings.

There is also an issue, legal issue respecting whether or not Mr. Neil Weissman, assuming that he did not render any financial or other nonlegal advice to the Lius, would have been under an obligation to do so.

There probably would be some expert testimony were the case to go to trial as to what the expert believes that another attorney would do under the circumstances, however, I question whether that testimony is sufficient to establish a legal obligation. It may be establishing what is often the practice, but that is different than a legal obligation, so I have a question there as well.

There is very substantial issue concerning the calculation and recovery of damages.

Although the Lius contend they have lost between $7 million and $10 million in damages as a result of the Defendants' actions, I think that there is a legitimate issue respecting whether or not their recovery could be at anything approximating that number. That is for two reasons. The first is because subsequent to the closing of the transaction, which they contend they were defrauded into entering, they encumbered property which was previously not encumbered in order to try to support the ongoing operations of the co-op.

If they are limited to a breach of contract theory, as the law would seem to suggest, then those damages which arose by virtue of their encumbering and subsequently losing some of their property, might not be foreseeable, and not properly recompensed as consequential damages.

> In addition, it could be argued that the Lius failed to avail themselves of bankruptcy protection at an appropriate point in time, waiting too long before they took action to mitigate their damages. So there too we have a very substantial issue.
>
> Finally, special counsel has admitted to me there may be some problem in relying on the testimony of certain people whom he would naturally have to call as a witness, and I am deliberately not revealing that on the record, in case, by some stretch, although I have approved the settlement, this were to be reversed on appeal, I don't want to prejudice anyone's case.
>
> But as the *in camera* examination demonstrated, Mr. Rudick is not entirely confident that he can rely on all of the people one might hope to be able to rely on in a trial of this matter.
>
> For all of those reasons which I have just elucidated, it seems to me that the $1.2 million which is the settlement amount under the $1.6 million insurance coverage, is the appropriate way to go here. These are much stronger claims than any of the other claims, and there is in addition the correlative benefit of the withdrawal of substantial claims against the estate.

(Respondent's Appendix). The Bankruptcy Court's September 3, 1997 order approving the Stipulation was entered on

September 4, 1997.

The District Court Decision

By order dated April 9, 1998, United States District Judge Sidney H. Stein affirmed Chief Bankruptcy Judge Bronzman's order approving the Stipulation holding that Chief Bankruptcy Judge Brozman had not abused her discretion and that she had appropriately canvassed the issues and determined that the settlement did not fall below the lowest point in the range of reasonableness.

The Second Circuit's Decision

By Summary Order dated December 21, 1998, the Second Circuit Court of Appeals affirmed District Judge Stein's April 9, 1998 order finding that "the $1.2 million settlement approved by the bankruptcy judge is manifestly within the range of reasonableness" and that "[i]n light of the risks inherent in pursuing the underlying claims, the bankruptcy court's decision was well within its discretion." The Debtors' motion for rehearing as denied by the Second Circuit.

ARGUMENT

THE BANKRUPTCY COURT'S APPROVAL OF THE TRUSTEE'S SETTLEMENT OF THE STATE COURT ACTION AND THE SUBSEQUENT AFFIRMANCES THEREOF WERE NOT AN ABUSE OF DISCRETION AND, IN ANY EVENT, DO NOT CONCERN IMPORTANT FEDERAL QUESTIONS SUFFICIENT TO WARRANT A REVIEW BY THE SUPREME COURT ON A WRIT OF CERTIORARI.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. Supreme Court Rule 10. A petition for a writ of certiorari will be granted only for compelling reasons and will rarely be granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. See *Fay v. Noia,* 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed 837 (1963); *Rice v. Sioux City Memorial Parks Cemetery, Iowa,* 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed 897 (1955)

In this case, the Summary Order does *not* conflict with the decision of any other United States Court of Appeals, does *not* decide an important federal question in a way that conflicts with a decision by a state court of last resort and does *not* so far depart from the accepted and usual course of judicial proceedings, or sanction such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power. Supreme Court Rule 10. Rather, the Summary Order affirmed the Bankruptcy Court's proper application of well settled law regarding the standard of review for settlements under 11 U.S.C. §9019.[4]

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4. The approval of a settlement rests with the sound discretion of the Bankruptcy Court which must determine whether the proposed compromise is in the "best interests of the estate". *In re Arrow Air, Inc.,* 85 B.R. 886, 891 (Bankr. S.D. Fla. 1988); *Depo v. Chase Lincoln First Bank, N.A.(In re Depo),* 77 B.R. 381, 383 (N.D.N.Y 1987), *aff'd* , 863 F.2d 45 (2d Cir. 1988). The Bankruptcy Court is required to make an informed and independant judgment concerning whether the settlement is fair and equitable based upon an educated estimate of the complexity, expense and likely duration of any litigation, the possible difficulties of collecting on any judgment, all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise and whether the settlement favorably compares with the likely rewards of litigation. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424-425, *reh'g denied,* 391 U.S. 909 (1968). *See American Can Co. v. Herpel (In re Jackson Brewing Co.),* 624 F.2d 605, 607 (5th Cir. 1980). The Bankruptcy Court must "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *Cosoff*

Indeed, regardless of the Debtors' baseless assertion that their appeal would concern Fifth Amendment due process and Federal Rule of Civil Procedure 60(b) issues, the *exclusive* issue to be determined by this Court would be whether, based upon the factual predicate of the State Court Action, the Bankruptcy Court, as affirmed by the District Court and by the Second Circuit, abused its considerable discretion by approving the $1.2 million settlement of the State Court Action, recommended by the Trustee and his counsel. Resolution of that issue does not involve serious Constitutional concerns nor important federal questions. Rather, it would simply require this Court to substitute its opinion regarding the complexity, expense and likely duration of any litigation, the possible difficulties of collecting upon any judgment, and all of the other factors relevant to a full and fair assessment of the Stipulation for that of Chief Bankruptcy Judge Brozman, the District Court and the Second Circuit. In sum, the Debtors do not seek to remedy a misapplication of the governing legal principles applied by the Bankruptcy Court or the appellate courts. Instead, they seek now to obtain from this Court a different factual conclusion based upon the application of the identical legal principles. Under those circumstances, the Debtors' petition for a writ of certiorari should be denied .

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v. Rodman (In re W.T. Grant Co.), 699 F.2d 599, 608 (2d Cir.), *cert denied*, 464 U.S. 822 (1983); *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.), *cert denied*, 409 U.S. 1039 (1972); *Chopin Assoc. v. Smith (In re Holywell Corp.)*, 93 B.R. 291, 294 (Bankr.S.D.Fla. 1988); *In re Teltronics Services, Inc.*, 762 F.2d. 185, 189 (2d Cir. 1985).

Conclusion

Based upon all of the foregoing, the Debtors' petition for a writ of certiorari should be denied in its entirety.

Dated: Garden City, New York
May _____, 1999

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of

GEORGE LIU,
Debtor.

Case No.
94 B 40970

August 19, 1997

United States Custom House
One Bowling Green
New York, New York 10004

Hrg. re: Settlement.
SEALED
(Pages 8 through 22)

BEFORE:

HON. TINA L. BROZMAN,
Bankruptcy Judge.

GEORGE LIU

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GEORGE LIU

PROCEEDINGS

THE COURT: Let me just start out by remarking that moments before I took the bench, I was handed a letter to be reviewed in camera from the Trustee's counsel, and I did not have an opportunity to review it, because it was right before I took the bench.

So I think perhaps it makes sense for me to take a brief recess and read through that before we proceed further.

MR. SILVERMAN: If I may, Kenneth Silverman as Trustee.

So Your Honor has a complete record, I want to be clear that Your honor has received everything I have received, in deference to the Lius and this particular proceeding.

THE COURT: I have received between the last hearing and today a letter from George Liu himself.

MR. SILVERMAN: With exhibits.

THE COURT: With exhibits.

MR. SILVERMAN: I was handed something today, and I believe, Your Honor, an attempt was made to hand you something during the last hearing.

THE COURT: Right, which is, as far as I am concerned, far too late, and objections were to have been filed in the past, so I'm not accepting it.

MR. SILVERMAN: That's fine. I just wanted to make the record complete as to facts and circumstances as Trustee I am aware of.

THE COURT: Okay. There are no other papers that I'm aware of.

MR. BROWN: Betram Brown for the Debtors.

GEORGE LIU

You have not received, Judge an August 14th letter addressed to you. It was handed out to everybody in the courtroom.

MR. SILVERMAN:It's August 18th, Mr. Brown. She has received the 14th.

THE COURT: I received a letter from Mr. Liu with documents attached to it.

MR.BROWN: That was August 10th.

THE COURT: I'm sorry, I don't know the date, but frankly it was completely inappropriate. He's not permitted to make ex parte communication with me, and he was, as I understand it, attempting to do that.

But – I'm sorry, that's a different letter. This is new. I guess this is what somebody tried to hand to me, the letter of August 14th, which I have not seen.

There was a different letter of August 10th, with exhibits, which I have seen.

Both of these letters were inappropriately submitted, because objections to the application were due, Mr. Liu is represented not by one, but two sets of counsel, both of whom I've heard from, so it's not appropriate that he's sending letters to the Court, and I'm not entertaining either of them, because he's ably represented.

Now I'll take the break I allowed to when I first began.

(Whereupon, at this point in the proceedings there was a recess, after which the proceedings continued as follows :)

THE COURT: I have now had an opportunity to read through the submission which the Trustee requested I

review in camera, and it leaves me with a number of questions, as a result of which I'm going to ask the Trustee, special counsel, and the court reporter to come into my chambers for an in camera hearing, so that I can explore some of the issues that are set forth in the letter before I render any type of decision.

Would you come inside, please, and I will, by the way, seal the transcript of this portion of the hearing.

(Pages 8 through 22 of the hearing was held in camera and the transcript is sealed.)

GEORGE LIU - SEALED

THE COURT: The first question I want to ask is a question of the Trustee's counsel.

Page 3 of the letter, in the second full paragraph, there is an indication there that special counsel is on board with this settlement.

Is that a typographical error, or is that correct?

MR. ACAMOPORA: Page 3?

THE COURT: Page 3, the second full paragraph in the fourth, third to fourth lines.

MR. SILVERMAN: Yes.

MR. ACAMOPORA: Yes, that is correct.

THE COURT: Correct that its an error?

MR. ACAMOPORA: No, correct that special counsel is on board, with the understanding that – with the strategy that proceed against Joseph Macari is a dangerous and would not be a fruitful manner in which to proceed with this case.

THE COURT: Mr. Rudick, will you confirm that for me.

MR. RUDICK: I haven't seen the letter.

THE COURT: I'll read this paragraph to you. There are parts of it I don't think I should reveal, but I will ask you question about it where I think it's appropriates.

"Thus, although Joseph T. Macari theoretically represents a potential source of recovery, the case against him of is such dubious merit, and the consequence of elements of such case are so dire that the Trustee, his counsel, and his special counsel believe that abandoning those claims in favor of the settlement set forth in the 9019 motion are justified

under the circumstances, and constitute a prudent exercise of the Trustee's business judgment."

MR. RUDICK: I would be on board, I would be on board to that . I would accept that premise, Your Honor.

THE COURT: All right. It is my understanding–

MR. RUDICK: Is this addressed to me again?

THE COURT: Yes, most of the questions will be addressed to you.

It is my understanding through the Trustee's general counsel that the thrust of the expert testimony underlying the Lius' case is that Neil Weissman and Lewis Macari were negligent in performance of their services for the Lius.

MR. RUDICK: That is correct.

THE COURT: If that is correct, then please explain to me what evidence you would introduce, what type of evidence you would introduce on negligence, when, as I understand it, based on pre-amendment case law and the statute of limitations, the negligence claims might be barred, which contract might not be, but negligence might be.

MR. RUDICK: I'm sorry?

THE COURT: Maybe I'm not explaining myself well.

Trustee has laid out, we touched on this at an earlier hearing, but has laid out some of the law with respect to the statute of limitations, and we all of us agreed that in all likelihood, the amendment to the statute was not retroactive, but prospective.

But the Trustee has further informed me that the Santulli case and its progeny have extended applicable statutes of limitations on legal malpractice to six years, but in so doing, have also limited the theory of recovery of breach of contract, that negligence is not unavailable theory if you're proceeding three years after the alleged malpractice occurred.

MR. RUDICK: Correct.

THE COURT: If that is correct, how can you expect to recover as against Neil Weissman and Lewis Marcari if the expert has given his opinion that their actions were negligent?

MR. RUDICK: Because the pleadings are couched in breach of fiduciary duty. In other words, there is a contract theory here, and to the extent that the –

THE COURT: Would your expert's testimony support your theory?

MR. RUDICK: The expert's testimony would definitely be in the area of negligence/malpractice. We're not talking about any intentional wrongs.

What I would have to do then is seek a ruling from the Court in the form of a, at the end of the case, a statement to the jury to the effect that you can make a finding, if you find that the lawyers were negligent, you can find that they breached their fiduciary obligation to the client, and therefore, okay, the six year statute of limitations would be applicable

THE COURT: Is there any case law which supports the proposition that you've just put forth?

MR. RUDICK: My understanding is under the progeny of these cases that the Santulli case, and Sears

Roebuck is another case, and there were some others, that basically the Courts have said that you can, and there are even cases that say you can where you haven't even pleaded contract in your Complaint, although I think I did, where the Court will imply a contract theory.

And on that basis, we can take a malpractice case, which under the old law would probably just be a negligence case, and can make it into a contract case

THE COURT: Is this a magic transformation, or are there additional elements you would have to prove over and above common law negligence in order to sustain a contract case?

MR. RUDICK: In think I would have to prove there was a contract relationship between is the parties.

There was an attorney-client relationship between the parties, and if in fact the negligence arose as a result of that attorney-client relationship, that the Court would apply the six year statute.

THE COURT: Now let me ask that question once again. Has that occurred in any of these cases that you've cited, that the Trustee cited?

MR. RUDICK: You mean Santulli and Sears Roebuck? None were exactly on point. This case is somewhat unique in that regard.

THE COURT: That's what I was trying to get to, whether what you're proposing is a, call it a novel application on the existing law? Or not necessarily, that there is an iffiness to it.

MR. RUDICK: If you read the cases, Judge, one would get the impression that what the Court of Appeals was

doing was liberalizing the rule to benefit as many people as it could.

And to that extent it seemed to me that the Court was in essence saying we'll take something which is, might be negligence in stance, because malpractice is negligence in stance, and what we'll do is we will apply a contractual application to it.

So that I just got the impression that a case similar to the one here, that if in fact, the Court of Appeals were called upon to rule on that question, that they would find that since the negligence arises out of the contractual relationship, we'll apply the six year statute.

Do I have a case that specifically says that? No.

THE COURT: Yes?

MR. ACAMOPORA: Just to clarify one point for you Your Honor.

The Santulli cases and Sears Roebuck cases concern themselves with the application of the statute of limitations. They really didn't concern themselves with what you would have to do at trial to get there.

The Court of Appeals said I will give you the six year statute, but what happens after that –

THE COURT: I understand that.

THE RUDICK: There would be another problem in terms of proving damages, and went on to say therefore, we would be limited in terms of the kinds of damages that we could prove.

We would have to be able to prove that the parties could have foreseen – the attorney, the attorney could

have foreseen the resultant outcome of whatever they did wrong here.

THE COURT: As I understand it, and let me make sure I understand it correctly, there was an iffiness about some of the damage claimed as well, because the Lius decided after this transaction to encumber previously unencumbered property, and also did not file bankruptcy when probably they should have.

MR. RUDICK: I have stated to counsel, I've stated to Mr. Silverman, I've also stated to Anthony Acampora, that although I had approximately $6.5 million worth of damages, I thought that $3.5 million worth of damages were realistically provable.

I thought that some of the others would be – once again, Judge, you're looking at a question of is it foreseeable they would go out and borrow monies on all of these other properties and do what they did. I think that would be stretching it.

The main thrust of my case were the damages that arose out of the transaction itself, and the transaction itself, the actual transaction, the monies borrowed, the monies loaned the interest paid back, et cetera, we're talking there about three and a half million dollars.

THE COURT: Which the Trustee proposes to settle under the malpractice insurance policies, refresh my recollection, for?

MR. SILVERMAN: $1.2 million out of the $1.6 million.

THE COURT: Available on the policies?

MR. SILVERMAN: Left available on the

policies.

THE COURT: Okay. Please tell me what your impression is, since a lot will rest on the credibility of the case, if the case is ultimately tried, your impression about the Lius' presentation as witnesses?

MR. RUDICK: Questionable They – during the depositions Mr. Liu did not make a good witness. Mrs Liu made a better witness. It conceivably could have been a problem at trial.

I'm not saying that – sometimes you have a very good witness and you know you have a good witness.

These people are very, very emotionally involved in this, Your Honor, and many, many times I couldn't get them to focus, and I don't know at a trial what a good cross-examination might have done with that.

I was prepared to – we never – we came close to it, but never came to the point I was prepared to – I wasn't going to put Mr. Liu on the stand at all. I was just going to use her, because she seemed to be a better witness.

I would not have put him on the stand. He gets very excited, very agitated, and where he was confronted with a difficult question, he would say, "I'm not saying anything, I'm not telling anything, I'm not talking."

It wasn't – there is no doubt about it. It would have been a problem with the case. We'd have to work on that.

THE COURT: Okay. Is there any legal authority under which Weissman would have been required to render financial or other type of advice to the Lius, in other words, to tell them to be circumspect and that they should retain other people?

MR. RUDICK: Weissman contends that he gave them this advice. Weissman also, I don't know whether it's in–

THE COURT: The Lius dispute it as I understand it.

MR. RUDICK: Absolutely. What made Weissman a little more vulnerable was the fact, I don't know whether it as reported to you, but, it may not have come up, that Weissman apparently lost his file in a fire which had never been documented in any way.

THE COURT: The fire had never been documented?

MR. RUDICK: There was a fire, and apparently through the water damage, they threw all the files out, so now he doesn't have a file.

THE COURT: We'll presume for purposes of discussion that the Lius' version of the facts is correct and that this advice was not given to them.

Is there legal authority which would suggest that Weissman was under an obligation to give them this advice which he didn't give them?

MR. RUDICK: I was going to rely on my expert. I had an expert in the area of cooperative and conversation law, similar to this kind of situation, co-op conversations.

THE COURT: Your expert's an attorney?

MR. RUDICK: An attorney. He was eminently qualified. Steve Raphael was his name. He was named in one of the periodicals as one of the ten best lawyers in New York, so the credentials were there.

I was going to rely on his opinion that any attorney in that area, in the field of cooperative conversation, would have advised the clients concerning the financial consequences of the transaction, and had to, because the financial --

THE COURT: Which is not really the standard. It would seem --

MR. RUDICK: Should have.

THE COURT: Should have, and the expert was prepared to so testify?

Now, of course, he indicates that he told this to them, okay, he told them to seek out -- so that we have here now a question of --

THE COURT: Factual dispute, I understand.

MR. RUDICK: Exactly. There is no documentation which I can point to which makes Neil Weissman vulnerable.

The only thing I have here is the testimony of the Lius and the circumstances of the case, what circumstances, you don't go into a deal like this under -- at the amount of money they paid.

What they probably could have received back if the thing had been-- he was looking at it as if it had been totally successful, that the rate of return would have been small, and it would have been small enough they should never have gone into this deal.

There is no doubt that the much stronger case, Judge, the much stronger case was against the other law firm.

THE COURT: Okay. Macari's, right?

MR. RUDICK: Yes.

THE COURT: Just one other factual question on that subject of Weissman. Does Weissman contend that he gave information to both of the Lius, or to one of the Lius?

MR. RUDICK: Both of the Lius. There were a number of various meetings that they had.

THE COURT: Both he and she attended?

MR. RUDICK: Yes.

THE COURT: The Trustee has informed me, you will recall that I had asked him to go check on the possibility of executing on a judgment over and above the insurance policies.

GEORGE LIU - SEALED

The Trustee has informed me that he, based on the information which he was able to obtain, it would appear that the individuals are judgment proof, and I just want to know whether you have any information to contradict that.

MR. RUDICK: I have nothing to contradict that. I was relying on what they said.

THE COURT: All right. I believe those were all of the questions which I had after reading this letter. Let me just check through it one more time.

THE COURT: I think we can go back into the courtroom. Thank you for coming in here. This portion of the transcript is to be sealed.

(End of sealed portion.)

GEORGE LIU - SEALED

THE COURT: Mr. Acampora.

MR. ACAMPORA: Yes, ma'am.

THE COURT: Is there anything that you want to state since or last hearing other than what's set forth in this letter which you sent to me?

MR. ACAMPORA: No, Your Honor.

THE COURT: Well, I think it's important, I think there is one thing that's important, and that is what you have discovered respecting the availability of alternate sources of recovery.

MR. ACAMPORA: Fine, Your Honor, I'll address that point.

When I left here after our last hearing, I immediately contacted counsel for the carriers and asked them two very important questions.

The first question was we would like some more money to settle this transaction, settle this deal, and I was met with a resounding no.

And the second question I asked them for was for financial statements for all the Defendants, so we could evaluate their financial condition, and I was always met with a resounding no.

We then proceeded to use the computer Internet sources that are available to us.

We have a program resident in our office called -- through Database Technologies, and what it is a program that searches public records and enables you to discover holdings on real property, who owns planes, boats, and other kinds of salient public information.

We did those searches for Macari, for Lewis

Macari, Neil Weissman, Frank Mesina, and Joseph Macari, and as set forth in our letter, Judge, we didn't come up with anything owned by Neil Weissman.

Mr. Mesina had minimal holdings. Mr. Macari had --

THE COURT: Which Mr. Macari?

MR. ACAMPORA: Lewis Macari had apparently transferred his home to his wife in what would be the fraudulent conveyance six-year statutory period, but the value of the home seemed to be minimal.

That represents just another lawsuit that would not really inure to the benefit of the estate.

Joseph Macari, to my surprise, owned quite a bit of real estate in his own name, and what we sent out in the letter is that the possibility of recovery against him is minimal.

Based on that, Your Honor, that is the search we've done.

There is not a tremendous amount of information on the Internet or otherwise that allows you to get into the individuals' finances.

As Your Honor knows, Dun & Bradstreet deals mostly with corporations, and that information is only as good as the corporation that is providing it.

So, our investigation has not turned up any other free assets upon which we could execute over and above the insurance coverage.

THE COURT: All right. Is there anything that any other counsel want to add?

That was what I sent to the Trustee off to do.

MR. BROWN: Judge, this is Bert Brown. I'm

beginning -- I need to inquire and take this in one direction only.

have a feeling that the two lawyers are in one place, the Joseph Macari -- the claim against Joseph Macari, I wonder whether or not if we were to settle the case against the two lawyers, against Lewis and against Weissman, whether or not there is any ability for us to proceed further against Joseph.

In other words, we have a theory, and whether or not it's plausible, the man has assets, there is something that can be done.

That's my only question, Judge.

THE COURT: All right. I don't think it's an unreasonable question. I'd ask Mr. Rudick to address himself to it.

He's given me some information, but I think he should do it in a more public way.

MR. RUDICK: I think a motion, Your Honor, I think that a motion can be made to sever the Joseph Macari case.

That's providing, of course, that the other Defendants do not object in any way. Such a motion can be made.

At this stage in the proceeding, on the event of a trial, I frankly don't know how a Judge in Supreme Court would rule on that.

Maybe -- I have trial counsel here as well. Maybe he can be of some assistance in that regard, as to whether or not the case could be severed against one of the Defendants.

MR. WASHOR: My name is Barry Washor.

I presume the settlements with the individually named Defendants, I'm not aware of whether they have been

linked in any manner or form.

That would be a determination that would have to be made by the Defendants.

THE COURT: His question, since you're looking perplexed, is whether the settlement would resolve the dispute against all the Defendants, including non- settling Defendants.

MR. ACAMPORA: There are no non-settling Defendants.

THE COURT: That's the question he had.

MR. . WASHOR: That's what's being proposed, I think, by Mr. Brown.

MR. SILVERMAN: May I have a minute, Your Honor?

THE COURT: Certainly.

MR. SILVERMAN: Your Honor, perhaps I'd like to address this without breaching the confidential nature of the document that's been sealed.

Intellectually, theoretically, the question asked by Mr. Brown is a fair one, and the answer would be yes, in a normal set of circumstances you could sever.

The insurance companies have no interest or desire to have to deal with the Joseph Macari claim.

But, what has been forgotten for the moment is that, and part of the settlement is a very, very substantial claim in the Debtor's estate of in excess of, I believe, correct me if I'm wrong, a million eight.

MR. GRAUBARD: A million eight?

MR. WOLF: Yes.

MR. SILVERMAN: A million eight is being

compromised as part of this settlement.

THE COURT: That's Mr. Joseph Marcari's claim.

MR. WOLF: And the claim of Blair House Owners Corp., which I also represent.

MR. SILVERMAN: Which is a deficiency after a foreclosure.

And if the case is thin, as we believe, and as special counsel believes, is thin against Joseph Macari, then in effect all we've done is increase the pool of senior distributees any -- to the settlement we've already effected, and thereby probably giving pause to creditors such as Sivan or Mr. Graubard, who sits to my far left, who would not want to see the Trustee sever the action if Mr. Graubard believed, as the Trustee believes, that the settlement with the Neil Weissman and Lewis Macari was substantially better than the claims against Joseph Macari.

So, to repeat, and without going further into why they we think those claims against Neil Weissman and Lewis Macari are better than the Joseph Macari claims, the answer is yes, you could sever, but not in this case, because there are incidental and collateral benefits that arise out of settling this globally.

THE COURT: All right.

MR. SILVERMAN: Which are substantially, economically substantially significant.

THE COURT: Are there any other comments anyone wants to make?

(No response.)

THE COURT: All right. I think the record will reflect after two hearings that I have given this very careful

consideration, and that I have fulfilled my responsibility of canvassing the issues to determine whether the settlement is properly approved.

After having engaged in that exercise, I can only conclude that this settlement is a proper and appropriate one for a number of reasons.

I am particularly persuaded by some of the comments made by Mr. Rudick, who is quite naturally sympathetic to the Lius, having represented them prior to his representation of the Trustee, and he has candidly admitted to me a number of things which go to influence my decision.

Number one is he has admitted to me that the case against Mr. Macari is, as the Trustee characterizes it, a thin one, and that there is a much stronger case against Lewis Macari's law firm than there is against Joseph Macari.

The Trustee has just explained quite ably why it makes sense to settle with Joseph Macari and not sever, and that is, to reduce the claims significantly that are asserted against the fund which would come into the estate.

To sever and proceed against Joseph Macari would really be rolling the dice twice, because the result could be that the claims against the estate stand, and in addition, there is no recovery as against Joseph Macari, and so there is kind of what I call a double whammy against the creditors of the estate, which I don't think would be appropriate, in light of special council's view of the strength of the case against Mr. Macari.

The Trustee has just explained quite ably why it makes sense to settle with Joseph Macari would really be rolling the dice twice, because the result could be that the claims against the estate stand, and in addition, there is no recovery as against Joseph Macari, and so there is kind of what I call a

double whammy against the creditors of the estate, which I don't think would be appropriate, in light of special counsel's view of the strength of the case against Mr. Macari.

There is also a bona fide issue with respect to the statute of limitations.

Although counsel are agreed, and I had indicated my preliminary agreement as well at the previous hearing, that the amendment to the statute of limitations is prospective only and not retroactive, there nonetheless is an iffiness to whether or not there could be a recovery as against Neil Weissman and Macari are negligent legally would be sufficient to translate into a breach of contract claim, such that the benefit of the six year statute of limitations could be obtained.

There is, Mr. Rudick candidly admitted to me, there is no case on point, and that those cases which have dealt with the issue in any way have been factually distinguishable.

So I think that although it may be that Mr. Rudick has the better of the arguments on this, there is far from any certainty, and there is -- it injects a further element of risk into these proceedings.

There is also an issue, legal issue respecting whether or not Mr. Weissman, assuming that he did not render any financial or other nonlegal advice to the Lius, would have been under an obligation to do so.

There probably would be some expert testimony were the case to go to trial as to what the expert believes that another attorney would do under the circumstances, however, I question whether that testimony is sufficient to establish a legal obligation.

It may be establishing what is often the practice, but that is different than a legal obligation, so I have a question

there as well.

There is a very substantial issue concerning the calculation and recovery of damages.

Although the Lius contend they have lost between $7 million and $10 million in damages as a result of the defendants' actions, I think that there is a legitimate issue respecting whether or not their recovery could be at anything approximating that number.

That is for two reasons. The first is because subsequent to the closing of the transaction, which they contend there were defrauded into entering, they encumbered property which was previously not encumbered in order to try to support the ongoing operations of the co-op.

If they are limited to a breach of contract theory, as the law would seem to suggest, then those damages which arose by virtue of their encumbering and subsequently losing some of their property, might not be foreseeable, and not property recompensed as consequential damages.

In addition, it would be argued that Lius failed to avail themselves of bankruptcy protection at an appropriate point in time, waiting too long before they took action to mitigate their damages. So there too we have a very substantial issue.

Finally, special counsel has admitted to me that there may be some problem in relying on the testimony of certain people whom he would naturally have to call as a witness, and I am deliberately not revealing that on the record, in case, by some stretch, although I have approved the settlement, this were to be reversed on appeal, I don't want to prejudice anyone's case.

But as the in camera examination

demonstrated. Mr. Rudick is not entirely confident that he can rely on all of the people one might hope to be able to rely on in a trial of this matter.

For all of those reasons which I have just elucidated, it seems to me that the $1.2 million, which is the settlement amount under the $1.6 million insurance coverage, is the appropriate way to go here.

These are much stronger claims that any of the other claims, and there is in addition the correlative benefit of the withdrawal of substantial claims against the estate.

I recognize that they will not likely lose anything, but because of all the reasons I've gone through, and after my careful consideration that notwithstanding on a personal level I have some sympathy to the Lius, I do not believe it would be an appropriate measure on my part to deny settlement of this action.

Have you brought an order?

MR. ACAMPORA: I brought an order.

Under the circumstances, I would prefer to settle an order on Debtor's counsel. I have to mark it up.

THE COURT: You may do so.

MR. ACAMOPORA: Thank you, Your Honor.

THE COURT: Thank you. You may do so.

CERTIFICATE

I, HOPE LYNN MEMAKER, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That I reported the proceedings hereinbefore set forth, and that the foregoing is a true record of the proceedings herein.

I further certify that I am not related to any of the parties to this action by blood or marriage: and that I am in no way interested in the outcome of this matter.

S/_____